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Case No. 80-420

IN THE

Supreme Court of the United States

October Term, 1980

LARRY C. FLYNT
JIMMY R. FLYNT
ALTHEA LEASURE FLYNT

Petitioners,

—vs—

STATE OF OHIO

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION OF STATE OF OHIO

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BRIEF IN OPPOSITION OF STATE OF OHIO

QUESTION PRESENTED

Whether the Ohio Court of Appeals and Ohio Supreme Court properly held that Petitioners, Defendants in a criminal action for violation of Ohio Pandering Obscenity statute, were not entitled to dismissal of such action on grounds of alleged unconstitutional discriminatory enforcement and that case should be remanded for trial in Cleveland Municipal Court on such misdemeanor charges.

STATEMENT OF THE CASE

The Supreme Court of Ohio, in an opinion reported as State v. Flynt, 63 Ohio St.2d 132 (1980), affirmed the Cuyahoga County Court of Appeals decision to remand the misdemeanor pandering obscenity charges against the Petitioners for trial.

The case began in June of 1976, when an anonymous citizen sent a copy of the July 1976 issue of "Hustler" magazine to the Cleveland Police Special Investigation Unit and complained about the issue and specifically about a cartoon showing sexual activity between President Ford, Secretary Kissinger, and Vice-President Rockefeller and the Statue of Liberty. Shortly thereafter, the Special Investigation Unit and its Obscenity Investigation Detail received telephone calls from citizens complaining about this issue of "Hustler" and the cartoon. (See Transcript at 49-50, 53-56, 148-49.) These police then investigated whether the magazine was being sold in Cleveland and just what "Hustler" magazine was as far as content was concerned. The police requested a ruling from this attorney, then Assistant Law Director, as to whether the officers of Hustler's corporation could

be charged in Cleveland for the crime of Pandering Obscenity in relation to the July 1976 issue. (Transcript at 48-50, 112) "Hustler" magazine was the only material under investigation at that time, because it was the only one on which complaints were received, but other magazines were investigated after the decision to prosecute "Hustler" had been made. (Transcript at 106-09, 149-50) The July issue of "Hustler" was reviewed by this writer and then the police secured a review of the magazine from several municipal court judges (not including at that time Judge Calandra who later signed the arrest warrants and was subsequently assigned these cases through the court's lottery assignment method). (Transcript at 152)

After the prosecution and the police received opinions from several judges that the magazine was or probably would be found

obscene, arrest warrants were prepared, the magazines needed for evidence of the sale of the July 1976 and August 1976 issues of "Hustler" were obtained by controlled police purchase, and the magazines presented to Judge Calandra for purposes of determining probable cause for issuing the warrants, the Defendants were arrested in July of 1976.

The cases were assigned to Judge Calandra, the Honorable trial court judge who entered the judgment of May 17, 1977, the Defendants were granted leave of court and continuances to allow the filing of pretrial motions and for hearings on the motions, and the hearing on the discriminatory prosecution issue was heard by the court on February 28, 1977. The Defendants were allowed to submit post-hearing briefs and the court issued its Memorandum to Attorneys and entered the dismissal on May 17th.

Testimony at Motion Hearing

On February 28, 1977, The Municipal Court held a hearing on the Motion to Dismiss to take testimony concerning the allegations of defendants of unlawful discrimination. The defense called this attorney, then Assistant Law Director, to the stand first. Upon preliminary questioning, it was disclosed that the City had made approximately 500 arrests which led to prosecutions on films and magazines from Cleveland's "adult" bookstores and theaters. (Transcript at 9-10.) Although most materials were explicit, some cases (perhaps 10%) involved child nudity, female masturbation, and newspapers such as "Screw" and "Smut" which did not involve intercourse or penetration clearly shown. (Transcript at 30-33.)

The prosecutor then summarized his views on "hard-core" from a street sense

and a legal sense, distinguishing the "lewd exhibition of the genitals" option of the "Miller Test" from the street sense of hard-core penetration. (Transcript at 36-42.)

"Hustler" was the first national magazine with a second class mailing privilege which was being prosecuted, but several other of these magazines then became "under investigation". (Transcript at 91-92, see also pages 52 and 134). The decision to bring further prosecutions had not yet been made, "because we're waiting for this case"; and whether those cases would follow, "I don't know. That decision, I can't make alone either."; but, "It's being discussed". (Transcript at 92.) The prosecutor admitted the likeness in "format" of several of these magazines (Transcript at 95-97), but explained the differences between "Hustler" and the others. (Tran-

script at 97-101.)

The defendants in this case were selected as officers of "Hustler" by their listing as such in the magazines (Transcript at 110), and this action followed the request by the police as to whether "Hustler" could be prosecuted in Cleveland. (Transcript at 112.) The role of this attorney in primarily deciding to prosecute "Hustler" after police request, as compared to the further role of superiors which would probably be necessary against other magazines because of the publicity and complexity which arose in this case, was discussed. (Transcript at 115-16.) However, the prosecutor summarized his intent as to prosecuting others as follows: "My decision wouldn't be any different. I would be willing to prosecute anyway. Certainly maybe a decision above me would prevent me which didn't prevent me in this case."

(Transcript at 117.) Among the considerations are public reaction (Transcript at 117), cost and time expended on certain classes of cases (Transcript at 118), publicity and jury verdict as measures of community standards (Transcript at 118-21).

The prosecution then made an independent statement as if he were asking himself questions, due to the fact that no other prosecutor was present to object or cross-examine, and the prosecutor related the action of the City against several magazines being displayed at the municipal airport. (Transcript at 126.) The prosecution then summarized his decision to prosecute "Hustler" as opposed to any or several others. One reason was the individual judgment of the "Hustler" magazine which was the subject of the complaint. Another reason was the ability to charge the officers of "Hustler" with the misdemeanor,

a tactic not readily available as to the other magazines. (Transcript at 127-28.)

The prosecutor continued with his statement of explanation that a test case on a "nationwide second class mailing privilege magazine" should not start with a local retailer who "like everybody else, has been selling it for years". (Transcript at 134.) Starting a test case against the officers of one of the magazines would be more appropriate, and even though it might attract more attention, the prosecutor was not then familiar with the reputation of the defendants. In fact, the City's case started before the prosecutor even knew about indictments in Cincinnati or elsewhere. (Transcript at 135.)

REASONS FOR DENYING WRIT

Proposition of Law No. 1

IN ORDER TO HAVE CRIMINAL CHARGES DISMISSED ON EQUAL PROTECTION GROUNDS, THE DEFENDANTS MUST

MEET A HEAVY BURDEN OF PROVING CONSCIOUS AND INTENTIONAL DISCRIMINATION.

The Petition presents one issue, that of the legality of the City of Cleveland's effort to prosecute officers of "Hustler" magazine for Pandering Obscenity under R.C. 2907.32, as to its first Reason of Granting the Writ.

First to be considered is whether the Petitioners met their burden of proof upon their Motion to Dismiss in the trial court. It is clear that such is their burden. It must be shown that the prosecution engaged in invidious discrimination amounting to bad faith harrassment based upon an arbitrary classification. Snowden v. Hughes, 321 U.S. 1, 8 (1944); Oyler v. Boles, 368 U.S. 448, 454-56 (1962); State v. Steurer, 37 Ohio App.2d 51, 58-59 (Summit County, 1973).

Before an evidentiary hearing even need be held, Petitioners should have presented

facts sufficient to "raise a reasonable doubt about the prosecutor's motive". U.S. v. Ream, 491 F.2d 1243, at 1246 (5th Cir. 1974); U.S. v. Falk, 479 F.2d 616, at 620-21 (7th Cir. 1973).

The general rule on the defendant's burden is well stated in People v. Goodman, 31 N.Y.2d 262, 290 N.E.2d 139, at 143 (Ct. App. N.Y. 1972):

> [I]t must be borne in mind that one who alleges discriminatory enforcement must meet the "heavy burden" of showing "conscious, intentional discrimination", . . . or a consciously practiced pattern of discrimination. . . . The conscious exercise of some selectivity in enforcement of the law is not in itself a constitutional violation.

This two-part test of selective discrimination is particularly well stated and supported by the recent decision of United States v. Catlett, 584 F.2d 864 (8th Cir. 1978). See also: People v. Mantel, 388 N.Y.S.2d 565 (1976). The late Senior Circuit Judge of the Eighth Circuit, Judge

Van Oosterhout, stated the following standard in a case alleging a selection of the defendant "which penalizes him for exercise of his first amendment rights" because the defendant had "received widespread publicity and notoriety", (Catlett, supra at 866):

> To establish the essential elements of a prima facie case of selective discrimination, a defendant must first demonstrate that he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted. Second, the defendant must demonstrate that the government's discriminatory selection of him for prosecution was based upon an impermissible ground, such as race, religion or his exercise of his first amendment right to free speech. United States v. Berrios, 501 F.2d 1207, 1211 (2nd Cir. 1974). We approved of this two-pronged test of "intentional and purposeful discrimination" in United States v. Swanson, 509 F.2d 1205, 1208-09 (8th Cir. 1975). See also United States v. Ojala, supra, 544 F.2d at 943.

It is admitted that the City's prosecution of "Hustler" magazine represents the first attempt to test the obscenity law

against the standards of the Cleveland community toward a magazine which is sold nationwide and openly and has a federal second class mailing privilege. This case was begun in 1976, before the conviction of the "Hustler" defendants in Cincinnati and in other states which brought them to nationwide attention. There is a simple reason for the selection of a single magazine to become a test of the law and the jury's judgment of standards. Obscenity cases are special in criminal law in that community standards can change, being "contemporary" for purposes of prosecution, and the class or type of materials subject to trial may change. Cleveland has had a systematic history of vigorous obscenity law enforcement and wishes to test Cleveland's standards of decency against "Hustler" to gauge the level of sexual explicitness or permissiveness the community feels should be

tolerated under the obscenity law.

As pointed out in the Transcript, at 88-102, there are other so-called "adult" magazines on the market. After the decision was made to prosecute "Hustler", many of them have been under investigation, even before the Defendants filed their motions, and will result in action depending on the outcome of this case. (See, Transcript at 91-93, and 115-18). In that sense, this is a "test" case. We are trying to determine if the genre of "men's" magazines has tread beyond the standards for obscenity. "Hustler" was picked not only for convenience of attaining process and jurisdiction against persons responsible for the magazine, but to make a test case against a magazine we felt was more crass and had less saving features than other known "men's" magazines. (See, Transcript at 126-28, and 134 for prosecutor's explanation, also pages 97-102 for

comparison of "Hustler" with others).

Also to be considered, especially in obscenity litigation, is that each title of each magazine, and each monthly or periodical edition of each magazine, must be judged on its own, and any finding has no effect on other titles or editions, except as a deterrent. This Court in Hamling v. U.S., 418 U.S. 87, at 126 (1974), stated that whether a magazine has a second class mailing privilege has no bearing on its obscenity. The Court further noted distinctly that any magazine to be prosecuted must be judged independently and not on comparison to others alleged to be similar. Id., at 125-26.

It was testified also (Transcript at 23, 28-30, 31-34, 37. 40, 46-47, 51-53, 126) that this City has prosecuted other materials which did not show explicit penetration, and took some action against

the magazines mentioned by the defense as other "men's" magazines at our Airport newsstands. This was evidenced on June 3, 1977, when the Mayor of Cleveland barred Hopkins Airport newsstands from selling any magazine, as "inappropriate" under our concession contract, containing "explicit pictures of nudity or explicit descriptions of sexual activity". These magazines included "Penthouse", "Playboy", "Genesis", "Oui", and the other so-called "men's" or "adult" books and magazines. The City once tested the standards for material which is "harmful to juveniles" in a case involving sexually suggestive cartoons. State v. Joseph Ricco, No. 32905 (Cuyahoga County Appeal, July 11, 1974) (unreported).

The Court of Appeals explained the major flaws in the defendants' proof, and held that their burden of proof had not been met. This decision was upheld on the

same ground by the Ohio Supreme Court. See: State v. Flynt, 63 Ohio St.2d, at 135.

Applying the above standards of review, the first Reason for Granting Review is without merit. (The opinions of the Cleveland Municipal Court, of the Court of Appeals, and the Supreme Court of Ohio are included in the Appendix to the Petition for Writ of Certiorari.)

Proposition of Law No. 2

THE COURT OF APPEALS, IN REVIEWING A MUNICIPAL COURT DISMISSAL OF CRIMINAL CHARGES ON DISCRIMINATORY ENFORCEMENT GROUNDS, MUST RULE ON THE SUFFICIENCY OF THE DEFENDANT'S EVIDENCE IN ESTABLISHING UNCONSTITUTIONAL ENFORCEMENT AMOUNTING TO CONSCIOUS, DELIBERATE, AND ARBITRARY DISCRIMINATION, AND IF THE DEFENDANT HAS NOT MET SUCH HEAVY BURDEN TO REMAND FOR TRIAL.

The established general rule in Ohio is that a Court of Appeals has the power to weigh evidence and, on a properly presented question of law, has the duty to

weigh the trial court evidence. State v. De Righter, 145 Ohio St. 552, at 560, (1945); Cooper v. State, 121 Ohio St. 562, at 569 (1930); State v. Petro, 148 Ohio St. 473, at 500 (1947). See also: State v. Smith, 39 Ohio App.2d 190, at 195 (Hamilton County, 1974); and State v. Arrindella, 137 N.E.2d 136 (Per Curiam) (Hamilton County, 1956).

As such, the Court of Appeals is the last resort where the parties have a right to examination into the factual weight of the proof. Kramer v. Toledo & O. C. R. Co., 53 Ohio St. 436 (1895). The Supreme Court has been relieved of the duty to determine as to the weight of the evidence by Section 2953.02 of the Revised Code. State v. Martin, 164 Ohio St. 54 (1955); State v. Strozier, 32 Ohio St.2d 62, 64-65 (1972). The Supreme Court need only determine the legal questions concerning whether the

proper rule of proof and review was utilized by the Court of Appeals. Mentor v. Giordano, 9 Ohio St.2d 140 (1967); Rheinstrom v. Steiner, 69 Ohio St. 452 (1904); Elster v. Springfield, 49 Ohio St. 82 (1892).

The Cuyahoga County Court of Appeals, in this case, was not differing with the Cleveland Municipal Court on the credibility of the witnesses, but was ruling that the evidence presented did not amount to sufficient proof of "deliberate discrimination based on an unjustifiable standard". (Opinion of Court of Appeals at page 5.) This was a question of law and fact which is particularly within the province of the appeals court, as is their proper function.

This standard of invidious discrimination amounting to bad faith harassment upon an arbitrary classification is supported by other authoritative pronouncements on this issue. See: Snowden v. Hughes, 321

U.S. 1, at 8 (1944); Oyler v. Boles, 368 U.S. 448, at 454-56 (1962); Maloney v. Maxwell, 174 Ohio St. 84, 186 N.E.2d 728, at 730 (1962); State v. Steurer, 37 Ohio App.2d 51, at 58-59 (Summit County, 1973); State v. Keich, 145 N.E.2d 532, at 535 (Mahoning County, 1956); City of South Euclid v. Bondy, 192 N.E.2d 139, at 142 (Mun. Ct. So. Euclid, 1963).

The law on unlawful discrimination has been consistent and strict throughout federal and state court decisions since the Yick Wo v. Hopkins case, 118 U.S. 356, was announced in 1886. The courts have always recognized the legitimate exercise of some selectivity when necessary for testing statutes and standards.

The cases finding illegal and unconstitutional conduct in the discriminatory enforcement have been of the type of malicious, conscious, and continued harass-

ment found in the famous case of Dombrowski v. Pfister, 380 U.S. 479 (1965), where subversive activities and communist control laws were used to suppress black rights movements.

In Snowden v. Hughes, supra at 8, Chief Justice Harlan Stone stated the general rule which is so often quoted:

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person [such as a statute which clearly restricts a particular company above] . . ., or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself [such as a city denying laundry licenses to all Chinese applicants and issuing licenses to non-Chinese: Yick Wo v. Hopkins, supra]. . . . But a discriminatory purpose is not presumed . . ., there must be a showing of "clear and intentional discrimination". . . .

This Court later clarified that mere selective enforcement was not unconstitutional enforcement. In Oyler v. Boles, supra at 454-56, the Defendant showed that he was one of six men qualifying for prosecution under a habitual offender law, but was the only one singled out for further action. The Court found that this selection was not an unconstitutional infringement on his rights:

> Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore, grounds supporting a finding of a denial of equal protection were not alleged. (Id., at 456)

From this precedent, many courts have held that any unequal enforcement, to be unconstitutional, must be accompanied by a malicious intent on the part of the prosecu-

tion. See: People v. Pearce, 87 Cal. Rptr. 814, 8 Cal. App.3d 984 (1970); State ex rel. Mulhern v. McHenry, 326 A.2d 132 (Conn. Super. 1974); People ex rel. Jones v. Adams, 350 N.E.2d 767 (Ill. App. 1976); State v. Coutcher, 424 P.2d 865 (Sup. Ct. Kan. 1967); People v. Gillespie, 201 N.W.2d 104 (Mich. App. 1972).

The general rule as to unconstitutional enforcement of otherwise valid laws was also stated in 16 Am. Jur.2d, Constitutional Law, Section 541, p. 930:

> Mere errors of judgment by officials will not support a claim of discrimination violative of constitutional guaranties of equality. Moreover, it is not enough to show that a law or ordinance has not been enforced against other persons as it is sought to be enforced against the person claiming discrimination. Mere laxity on the administration of the law, no matter how long continued, is not and cannot be held to be a denial of the equal protection of the law. To establish arbitrary discrimination inimical to constitutional equality, there must be something more, something which in effect amounts to an intentional

> violation of the essential principle of practical uniformity. Some courts have taken the position that in the absence of facts properly pleaded, showing a fixed and continuous policy of unjust discrimination on the part of a municipality, they will not enter on a consideration of the question whether its administration is in violation of the guaranties as to the equal protection of the laws.

In perhaps one of the best researched and clearly reasoned histories on the law of discriminatory enforcement, People v. Utica Daw's Drug Co., 225 N.Y.S.2d 128 (1962), the Appellate Division of the Supreme Court of New York clarified the law as to burden of proof, matters of evidence, and requirements of the law. While remanding for a new trial, the court gave guidance on issues which are most applicable to this "Hustler" magazine case, and which are supported by testimony in the record (See: Transcript at 126-28, 134-36):

> [E]ven if the enforcement of a particular law is selective, it does not necessarily follow that it is

> unconstitutionally discriminatory. Selective enforcement may be justified when the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law or to establish its validity. Selective enforcement may also be justified when a striking example or a few examples are sought in order to deter other violators, as part of a bona fide rational pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be unnecessary. It is only when the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others, that a constitutional violation may be found. (Id., at 136)

The Court then recommended two excellent and comprehensive articles on this subject: "Discriminatory Law Enforcement and Equal Protection from the Law", 59 Yale Law Journal 354, and "The Right to Nondiscriminatory Enforcement of State Penal Law", 61 Columbia Law Review 1103. These articles were also cited with approval by the court in State v. Steurer, supra at 59.

Courts have evidenced a distinct

restraint in finding unlawful discrimination by prosecutors unless obviously shown to be in bad faith.

A recognized case on this issue pointed to the importance in deferring to prosecutorial discretion and the seriousness of challenging that discretion except under extreme circumstances clearly demonstrated to the court. U.S. v. Cox, 342 F.2d 167, at 171 (5th Cir. 1965), cert. den. 381 U.S. 935.

This appeal involves the prosecution's exercise of discretion in charging the alleged owners and operators of a magazine which has been ruled to be probably obscene. That this magazine is the first of a class of material which enjoys a federal "second class mailing privilege" and is nationally and openly distributed are not valid grounds for dismissal.

An argument similar to this was in-

volved in the case of U.S. v. Raven, 500 F.2d 728 (5th Cir. 1974), and was clearly denounced by that court.

A similar result was reached in Dear Wing Jung v. U.S., 312 F.2d 73, at 75 (9th Cir. 1963), where a defendant, who was being prosecuted for falsifying his identity in his wife's naturalization proceedings, "claimed that the prosecution was illegal and in violation of the due process clause in that he was picked out discriminatorily because of his suspected radical leanings". The court held there was no constitutional violation and deferred to the presumed validity of the U.S. Attorney's discretion.

See also in U.S. v. Sacco, 428 F.2d 264, at 271, cert. den. 400 U.S. 903 (9th Cir. 1970), where the defendant claimed he was denied due process and equal protection in being singled out and relentlessly investigated because of his suspected

complicity in other unrelated crimes.

This rule was also followed in this federal judicial circuit in Delia v. Court of Common Pleas of Cuyahoga County, 418 F.2d 205, at 206 (6th Cir. 1969). See also: Powell v. Power, 436 F.2d 84, at 88 (2nd Cir. 1970); Swain v. Alabama, 380 U.S. 202 (1965); Mackay Tel. and Cable Co. v. City of Little Rock, 250 U.S. 94 (1919); State v. Nixon, 517 P.2d 212 (Wash. App. 1973); Brickhouse v. Commonwealth, 159 S.E.2d 611 (Sup. Ct. Va. 1968).

The rule in Ohio is best stated in the recent case of State of Ohio v. Steurer, supra, 37 Ohio App.2d, at 58-60, the headnote of which states:

> The discretion exercised by law enforcement officials in determining which of several persons to prosecute is not an infringement upon the constitutional rights of those selected so long as there is no unjustifiable standard adopted or arbitrary classification used.

Under these standards of law, the Ohio

Supreme Court and the Court of Appeals were within their province to order a trial to be had. The facts developed at the hearing showed an open and fair disclosure of circumstances by the prosecutor and police. A more candid display of testimony could not have been asked for. The City clearly showed that it wished to begin prosecuting this type of magazine, picked "Hustler" because of its feature of being one of the worst of the lot, and because the true offenders, the financially interested publishers, could be brought before the Cleveland Municipal Court as an example to local retailers and wholesalers as to the tolerance of the Cleveland community for the future.

CONCLUSION

If the city prosecution staff were to prosecute all or several "adult" magazines of this type at one time, the burden in

time and expense would be prohibitive. It seems only reasonable to test our community standards in a rational, deliberate method on a case-by-case basis. Such was the method adopted in this "Hustler" case.

The Petitioners established only preliminary selection, but it was not shown to be arbitrary or capricious. It certainly was not shown to be in bad faith, for purposes of harassment, or for obvious discrimination reasons.

Therefore, the trial court's dismissal of the charges was not based upon sufficient legal justification, the Ohio Supreme Court and the County Court of Appeals were within their province and correct in remanding for trial, and this Court should affirm these decisions and allow this matter to proceed

to trial. The Petition for Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief in Opposition of State of Ohio was sent by U.S. Mail, Postage Prepaid, on this 24th day of October, 1980, to the Attorneys for Petitioners:

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